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IN THE
SUPEREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981
NO. _____

SHIRLEY J. RUFFIN,

Petitioner,

v.

William J. Casey, ~~STANSFIELD TURNER~~, Director,
Central Intelligence Agency, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE U.S. COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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May 24, 1982

QUESTION PRESENTED

Is Title VII the exclusive judicial remedy for federal employment discrimination, even where the transactions giving rise to the claims are cognizable and pled under the First and Fifth Amendments?

Respondents not named in the caption are: Noel Firth, Fred Lott, Rebecca Donegan, and Granville Woodson.

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Shirley J. Ruffin v. Stansfield Turner, Director, Central Intelligence Agency, et al. (D.C. Cir. 1982) .

No. 80-2337, [No Opinion] Filed, February 24, 1982.

E. GROUNDS ON WHICH JURISDICTION IS INVOKED:

1. Date of Judgment, United States Court of Appeals For the District of Columbia Circuit: February 24, 1982.

2. The ninety day period expires on May 25, 1982.

3. Statutory Provisions conferring on this Court jurisdiction to review by writ of certiorari: 28 U.S.C. §1254(1).

F. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED:

1. Amendment I - U.S. Constitution:

Congress shall make no law ... abridging the freedom of speech, ... or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

2. Amendment V - U.S. Constitution:

No person ... (shall) be deprived of ... liberty or property, without due process of law ...

3. 42 U.S.C. §2000e-16(a):

All personnel actions affecting employees or applicants for employment ... in executive agencies as defined in section 105 of Title 5 (including employees and applicants for employment who are paid from nonappropriated funds), ... shall be made free from any discrimination based on race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

The petitioner, Shirley J. Ruffin, was employed by the Central Intelligence Agency from 1963 until 1978. On April 30, 1978 she filed a formal complaint alleging race and sex discrimination (Ms. Ruffin is black) under Title VII. On June 23, 1978 she filed a retaliation complaint based on actions taken against her by her supervisors during the pendency of her formal complaint. In early July, 1978, respondent Noel Firth, Director of the Office of Imagery Analysis, the division where petitioner was employed, requested a meeting of the agency Personnel Evaluation Board. His justification was that petitioner presented problems in her section due to her personality, and that she exhibited tendencies that closely resembled the profiles of potential national

security violators. The Personnel Evaluation Board ordered petitioner to undergo a physical and psychiatric fitness for duty examination. Petitioner refused to take the examination, believing it to be another act of retaliation for her complaints. On July 26, 1978 she was placed in a non-duty pay status and barred from her work place. On August 3, 1978 she filed another retaliation complaint based on the actions that took place in July. After some seven weeks in the non-duty pay status, realizing she would not soon be allowed to work, petitioner resigned.

After waiting over 10 months, during which the agency promised an investigation, but did little to investigate her complaints, petitioner, on June 12, 1979 filed a 9 count complaint in the United States District Court for the District of Columbia,

naming the respondents as defendants. The 9 counts were titled 1) Sex Discrimination; 2) Race Discrimination; 3) Retaliation; 4) Procedural Violation of Title VII; 5) Denial of Freedom of Association; 6) Denial of Freedom of Speech; 7) Conspiracy; 8) Wrongful Discharge; and 9) Violation of Equal Pay Act. Counts 4 through 8 alleged causes of action founded directly on the First and Fifth Amendments to the Constitution.

The respondents filed various motions to dismiss, and the District Court dismissed all non-Title VII claims against the agency and the named individuals, except for count 9, which was allowed against the aceny, but was later abandoned by the petitioner. What was tried, then, were counts 1 through 3, against the agency only.

In dismissing all counts but 1,2,3

and 9, the district court relied on Brown v. General Services Adminstration, 425 U.S.. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), and Pace v. Mathews, 12 E.P.D. ¶11,108, 15 F.E.P. Cases 703 (D.C.D.C. 1976). The court reasoned that Title VII was the exclsive remedy, even to the exclusion of causes of action based directly on the Constitution.

A non-jury trial was held in September, 1980. The court found for the agency on all counts. Petitioner then appealed to the United States Court of Appeals for the District of Columbia Circuit. The question before that court was "(W)hether or not the District Court erred when it dismissed causes of action founded directly on the Constitution, on the ground that 42 U.S.C. §2000(e)-16 (Title VII) provided the exclusive judicial remedy for federal

employees faced with discrimination in employment." On February 24, 1982 that court affirmed the district court in a terse memorandum opinion.

ARGUMENT

I. THE COURT OF APPEALS HAS DECIDED IMPORTANT QUESTIONS OF FEDERAL LAW IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

A. The Decision Of The Court Of Appeals Is Inconsistant With The Rulings Of This Court With Respect To Bivens-Type Actions.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), this Court, for the first time, directly[1] approved the idea that one could base a cause of action in a federal court on the United States Constitution. There, a cause of action was allowed founded on the Fourth Amendment.

[1] Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946), intimated that caused of action based directly on the Constitution might be maintained in federal courts, but never directly decided the question.

It held individuals liable for constitutional violations committed while they were agents of the Federal Bureau of Investigation.

Since that time this Court has reinforced the idea that the Constitution is, itself, a body of positive law, radiating its own right of enforcement independent of the acts derived from it. This reinforcement came in the form of various cases that served to illustrate the idea of the primacy of the Constitution over other sources of authority in the American Government. In Butz v. Economou, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978), a cause of action based on the First Amendment was upheld against agents of the Department of Agriculture; only those engaged in the adjudicatory process were given immunity, while others not so engaged where held liable

for their acts.

In Davis v. Passman, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), this Court extended the liability of those guilty of constitutional torts to the members of the legislative branch. While taking note that petitioner did not have Title VII available as a remedy to her, 442 U.S. 247, this Court also was quick to point out "... that the question of who may enforce a statutory right is fundamentally different from the question of who may enforce right that is protected by the Constitution." 442 U.S. 241.

Carlson v. Green, 446 U.S. 14, 100 S. Ct. 1468, 64 L.Ed.2d 15 (1980), saw the extension of liability, based on the Constitution, into areas that were popularly thought to be the exclusive domain of statutory enactment, in that case the Federal

Tort Claims Act (28 U.S.C. §2680(h)). Carlson is noteworthy for another reason. It was there that the test was put forth for whether a particular statute could pre-empt a cause of action based on the Constitution. The Court asks whether there are "special factors counselling hesitation in the absence of affirmative action by Congress," and whether "... Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. 14,18-19.

The first prong, whether there were 'special factors counselling hesitation', was met in neither Carlson nor Davis. In the former the fact that the officials were involved in running a federal prison was not special enough; and in the latter, that the defendant was a Congressman, who prac-

ticed sex discrimination in employment, was not deemed special enough a situation. To the extent that a Congressman's position created addition concerns, these were addressed by the protections afforded by the Speech and Debate clause. 442 U.S. 228, 246.

There is no decision counsel could find that set out the factors defining the 'special factors' needed to withhold a Bivens remedy. The case of Purtill v. Harris, 658 F.2d 134 (3rd Cir. 1981), upheld pre-emption of Bivens-type actions where the Age Discrimination in Emplyment Act, 29 U.S.C. § 621 et seq., was held to be the exclusive remedy for age discrimination in federal employment. In making that decision the court of appeals held federal employment fundamentally different from private employment and Congressional intent the same

for both the age act and Title VII on which it was closely modeled. 658 F.2d 134,137.

The court in Purtill cited Bush v. Lucas, 647 F.2d 573 (5th Cir. 1981) on remand from 446 U.S. 914, 100 S.Ct. 1846, 64 L.Ed.2d 268 (1980). That case held that the condition of federal employment, in general, was a 'special factor' giving rise to pre-emption of a Bivens remedy. The case was remanded to that court for reconsideration in light of Carlson v. Green, supra, after it refused such a remedy sought by a federal employee who claimed he was demoted for exercise of First Amendment rights. See 598 F.2d 958 (5th Cir. 1979).

In so holding the courts went beyond any holding of this Court. Their rationale was that "... Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs'"

647 F.2d 573,576, citing Sampson v. Murray, 415 U.S. 61, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) at 415 U.S. 83. We, of course, must differ with this holding. Neither Bush nor Purtill give a very convincing explanation for the special status of Government employment. Certainly, it is no more special than being a police officer or fireman, at least as regards the need for discipline and internal governance. See Torre v. Barry, __ U.S. App. D.C. __, 661 F.2d 1371 (1981).[2]

In our case there is little justification for conferring any special status on the petitioner merely because she worked for the CIA. What special protection is needed because of the agency's mission is provided by exemptions in other laws. See

2 That case allowed a D.C. fireman to sue under 42 U.S.C. §1981 and the Fifth Amendment; he was not a federal employee.

e.g., 5 U.S.C. §552 et seq. and 50 U.S.C. §403. While the agency has invoked the spector of 'national security' (App. B-12 to B-13) we assert that it was only a pretext. More importantly, the district judge never found that she ever disclosed or threatened to disclose anything. (App. B-1 to B-19).[3]

The second test enunciated in Carlson is whether or not "congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." 446 U.S. 14,18-19. This test brings us back to Brown v. G.S.A., supra. There at page 825, this Court spoke directly to our concern when it stated, "(C)ongress simply failed explicitly to de-

3 Strangely enough, petitioner, after resigning from CIA, received a high clearance to do similar work for private contractors.

to describe §717's position in the constellation of antidiscrimination law." (Emphasis supplied) While it is clear that 'magic words' need not be recited, it is equally clear that Congressional intent was never spelled out.

Further, the second part of the test calls for assessment of the effectiveness of the remedy when compared to that which the Constitution would provide. In the case of Title VII there is no jury trial, no punitive damages and it is difficult to police the personnel of the agency. All of these concerns were addressed in Carlson, and are present in our case. This last concern has a special congency where the CIA is concerned because it is a closeed agency so shrouded in secrecy that no remedy as conceived under Title VII can adequately insure compliance. Even if com-

pliance could be assured, the remedies are in no sense equivalent.

B. The Court Of Appeals Misconstrued This Court's Decision In Brown v. G.S.A.

Brown v. G.S.A., 425 U.S. 820, 96 S.Ct. 1961, 48 L.Ed.2d 402 (1976), decided no more than that Congress meant to pre-empt other statutory causes of action for federal employees when it amended the Civil Rights Act of 1964 to include them. That case pitted Title VII against 42 U.S.C. §1981, and the Declaratory Judgment Act, 28 U.S.C. §§2201-2202. No constitutional provisions were pled or invoked. 425 U.S. 823-824. Any conclusion that the decision purports to decide whether VII is exclusive, even in the face of constitutional causes of action, is an extension of the Brown decision beyond the case or controversy

that was before this Court when it decided that case.

While there are intimations that that was what was decided, it would be far better to decide such an issue directly. Beside, when Brown is read carefully on the issue of congressional intent, as to exclusivity, what emerges is the Court's conclusion that Congress was concerned, perhaps incorrectly, only with the lack of remedy against the Federal Government. 425 U.S. 825-829. What we have here, as in all Bivens actions is a suit against the individuals as well as the agency. The two should not be confused.

If a person is sued in his own individual capacity he has the protection of his status as federal employee only to the extent that his actions are inside the 'outter perimeter' of his duties. This is the

only protection given them. See Barr v. Matteo, 360 U.S. 564, 79 S.Ct. 1335, 3 L.Ed. 2d 1434 (1959), and Butz v. Economou, supra. It is important to maintain the distinction between an agency and the individuals in it. Considerations of sovereign immunity attend the former but not the latter. Any 'immunity' that the individual possesses derives from other sources. The courts of appeal have not honored this distinction well. Petitioner, here, seeks redress against both the individuals and the agency that violated her constitutional rights.

While we may prefer the idea that not even the Government can hide from the Constitution[4], the Eleventh Amendment, with the passage of time, seems to have established the contrary proposition.[5] This

4 See Chisholm v. Georgia, 2 Dall. (2 U.S.) 419, 1 L.Ed 440 (1793).
5 See Anno. Constitution, Jayson, Ed. (1972), p. 1275, citing Cohens v. Virginia, 6 Wheat. (19 U.S.) 264 (1821).

being so because the concept of sovereign immunity insulates the Government to an extent not applicable to persons. Because of this it is even more important to distinguish agency from individual when considering the question of exclusivity of remedy.

The idea contained in Bivens has evolved over the last decade. Carlson seems to say that only a remedy as good as the Constitution, itself, should supplant the Constitution. This concept leaves room, even in the face of Brown v. G.S.A., for allowing suits founded on the Bill of Rights. There are few crannies left in which the question of the existence of Bivens remedies is left unsure. The Court should decide this question so as to clear up this area of doubt.

II. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The question presented has not been directly decided by this Court, but is an important question that should be decided. There are nearly 3 million employees working in the Federal Government. The boundries that delimit their recourse to the Constitution, inside the employee-employer relation should be clearly set out. The current situation create an unusual gap of knowledge over what to plead or rely on when a federal employee opposes the personnel actions of an agency or a superior. Since the elements of a constitutional cause of action are very different from one based on Title VII, and the defenses are also very different, the employee, the

agency, and the individual superiors and agents should know the scope of their protection and their liability.

The importance of the question presented is further shown by the Government's brief in the court of appeals in this case. It was captioned: "The District Court properly dismissed appellant's claims for damages founded upon the Constitution on the ground that Title VII is the exclusive judicial remedy for federal employees alleging job discrimination." There was no attempt by the Government to avoid the question or to imply that it should not be decided.

III. THE PROCEDURAL POSTRUE OF THIS CASE WILL ALLOW THE COURT TO DECIDE THE QUESTION PRESENTED.

Paramount to any decision on whether or not to grant the writ of certiorari must be whether or not the procedural posture of the case is appropriate to decision of the question presented. Because the entire case was not appealed[6] there may be some question, especially in view of the court of appeals' memorandum (App. A). The 4th paragraph says, in its entirety:

> Moreover, the district court's findings, which Ruffin has not assailed and reasonably could not assail as clearly erroneous, support the district court's conclusion that plaintiff had failed to establish any race or sex based adverse employment action or reprisal. Therefore, even if Title VII did not exclude other

6 Petitioner did not appeal the findings of the district court only because she could not afford the transcript of a 4 day trial; she did not qualify for in forma pauperis treatment. In any case, we maintain that the issues on appeal are not dependent on what the district judge decided.

judicial remedies for federal employment discrimination, Ruffin would not be entitled to relief.

First, the entire trial transcript with exhibits was never before the court of appeals. Only the transcript of the status hearing of February 7, 1980, at which the district court explained its reasons for dismissal of the non-Title VII counts, was before the court of appeals. In addition, all the written pleadings were before that court. Second, even if the court was correct in its decision about the Title VII counts, that would not preclude us from having a right to plead alternative causes of action[7] and to have them decided, in this case, by a jury. Third, the elements of a First and Fifth Amendment case differ from that of a Title VII case. Fourth, even if they did not, where two causes of action

7 See Rule 8 - Federal Rules of Civil Procedure.

are pled, having common issues of fact, one requiring a jury and the other not, the one requiring a jury should be submitted to the jury before the other issue is decided by the judge. See Beacon Theaters v. Westover, 359 U.S. 500, 79 S.Ct. 948, 3 L. Ed.2d 988 (1959), and Dairy Queen, Inc. v. Wood, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 2d 44 (1962), cited in National Life Insurance Co. v. Silverman, 454 F.2d 899 (1971).

Our third point is most important. It is clear that the elements of First and Fifth Amendment causes of action differ from those of a Title VII case. See McDonell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973), and compare with Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), Davis v. Passman, supra, and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct.

2694, 33 L.Ed.2d 570 (1972). The district court never passed on these allegations in their substantive form.

A reading of the district court's own Findings of Fact (App. B, passim) reveals that the temporal sequence of events, alone, will give rise to a prima facie case, at least as to the First Amendment. See Harper v. Blumenthal, 478 F.Supp. 176 (D.C.D.C. 1979). In fact, if the Findings are read in the correct light, they, on their face, make out a prima facie case of reprisal even under Title VII. See Gonzales v. Bolger, 486 F.Supp. 595 (D.C.D.C. 1980) and Hochstadt v. Worcester Foundation For Experimental Biology, 425 F.Supp. 318 (D.Mass. 1976). But we emphasize that even if they did not it would make no difference in the procedural posture for purposes of determining the question presented.

CONCLUSION

Because the court of appeals has decided petitioner's case in a manner that conflicts with applicable decisions of this Court, and because of the importance of the question presented, petitioner respectfully requests that the Court issue the writ of certiorari and review the case.

Respectfully submitted,

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